

IN THE CASE OF: [REDACTED]

BOARD DATE: 10 October 2024

DOCKET NUMBER: AR20230014363

APPLICANT REQUESTS: in effect, physical disability retirement in lieu of transfer to the Retired Reserve due to reaching his mandatory removal date (MRD) for maximum authorized years of service, with subsequent placement on the Army of the United States Retired List.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Department of Veterans Affairs (VA) Rating Decision, dated 28 June 2018
- email correspondence, dated July – September 2020

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant states:

a. He respectfully requests medical retirement based upon his VA disability evaluation rating of 90 percent. He had initiated the process for Medical Evaluation Board (MEB) review for a medical retirement and was assigned a 90 percent disability rating by the VA.

b. His initiation of an MEB was denied during COVID quarantine in part due to his status as a Reservist beyond reasonable commuting distance of an active duty base. He was unaware of a recourse mechanism as the U.S. Army Reserve (USAR) would not extend his MRD and closed his case on 9 September 2020. He has attached the email correspondence. Since then, his medical condition in and around his existing maladies has worsened. He marked the box on his DD Form 149 indicating post-traumatic stress disorder (PTSD) is a condition related to his request.

3. Multiple service records, including DD Forms 214 (Certificate of Release or Discharge from Active Duty), National Guard Bureau (NGB) Forms 22 (Report of Separation and Record of Service), orders, and his DA Form 5016 (Chronological Statement of Retirement Points), show that after prior periods of honorable enlisted service from July 1985 through July 1990, in the Regular Army, the USAR, and the Army National Guard (ARNG), to include a period in a Reserve Officers' Training Corps (ROTC)/Simultaneous Membership Program (SMP) status, the applicant was appointed as a Reserve commissioned officer of the Army, branch unassigned, on 27 July 1990, and then appointed as a second lieutenant in the ARNG in the Branch Infantry, effective 11 December 1990.

4. From December 1990 through September 1997, without a break in commissioned service, the applicant remained alternately assigned to either the ARNG or the USAR Control Group (Reinforcement) until his assignment to a USAR Troop Program Unit (TPU) in September 1997, which is the status he remained in throughout the duration of his remaining military career.

5. Multiple DD Forms 214 show the applicant was ordered to active duty and deployed as a member of a USAR TPU to the following locations during the following timeframes:

a. On 10 February 2003, he was ordered to active duty in support of Operation Joint Guardian, with service in Kosovo from 4 March 2003 through 23 October 2003. He was honorably released from active duty due to completion of required active service and transferred back to his USAR TPU on 6 November 2003. He was credited with 8 months and 27 days of net active service this period.

b. On 21 August 2005, he was ordered to active duty in support of Operation Iraqi Freedom, with service in Iraq/Kuwait from 3 September 2005 through 2 April 2006. He was honorably released from active duty due to completion of required active service and transferred back to his USAR TPU on 30 April 2006. He was credited with 8 months and 10 days of net active service this period.

c. On 22 September 2009, he was ordered to active duty in support of Operation Enduring Freedom, with service in Afghanistan from 3 November 2009 through 14 September 2010. He was honorably released from active duty due to completion of required active service and transferred back to his USAR TPU on 14 November 2010. He was credited with 1 year, 1 month, and 23 days of net active service this period.

6. U.S. Army Human Resources Command (AHRC) Orders B-11-606128, dated 30 November 2016, promoted the applicant to the rank of colonel effective 1 September 2016.

7. A final DD Form 214 shows on 2 December 2016, the applicant was ordered to active duty in support of Operation Freedom's Sentinel, with service in Afghanistan from 10 December 2016 through 24 June 2017. He was honorably released from active duty due to completion of required active service and transferred back to his USAR TPU on 8 August 2017. He was credited with 8 months and 7 days of net active service this period.

8. A VA Rating Decision, dated 28 June 2018, shows the applicant was granted a service-connected disability rating for the following conditions effective 9 August 2017:

- other specified trauma and stressor related disorder (claimed as PTSD), 50 percent
- degenerative arthritis thoracolumbar spine with in vitro diagnostics (IVDS) and segmental instability, 20 percent
- right shoulder, glenohumeral joint osteoarthritis, 20 percent
- degenerative arthritis of the cervical spine, 10 percent
- left ankle status post fracture with residuals, 10 percent
- osteoarthritis, right elbow (impairment of supination), 10 percent
- osteoarthritis, right elbow (limitation of adduction), 10 percent
- patellofemoral pain syndrome, left, 10 percent
- patellofemoral pain syndrome, right, 10 percent
- tinnitus, 10 percent
- hearing loss, right ear, 0 percent
- osteoarthritis, left hip (limitation of flexion), 0 percent
- osteoarthritis, right hip (limitation of flexion), 0 percent
- left ankle scar, right elbow scar, 0 percent

9. A physical profile is used to classify a Soldier's physical disabilities in terms of six factors, as follows: "P" (Physical capacity or stamina), "U" (Upper extremities), "L" (Lower extremities), "H" (Hearing), "E" (Eyes), and "S" (Psychiatric) and is abbreviated as PULHES. Each factor has a numerical designation: 1 indicates a high level of fitness, 2 indicates some activity limitations are warranted, 3 reflects significant limitations, and 4 reflects one or more medical conditions of such a severity that performance of military duties must be drastically limited. Physical profile ratings can be either permanent (P) or temporary (T).

10. The applicant's available service records do not contain a copy of his DA Form 3349 (Physical Profile) and it has not been provided by the applicant.

11. A review of the AHRC Soldier Management System (SMS) shows:

- the applicant's last physical was on 18 May 2020

- the date of his physical profile was May 2018, which shows a PULHES of 133211, with significant limitations in factors U, L, and H, and no limitations in the remaining factors
- his medical readiness classification code (MRCC) was 3 (not medically ready)

12. Headquarters, 81st Readiness Division (USAR) Orders 20-150-00032, dated 29 May 2020, reassigned the applicant from his current USAR TPU assignment to the Retired Reserve effective 1 August 2020, under the authority of Army Regulation 140-10 (USAR Assignments, Attachments, Details and Transfers), due to maximum authorized years of service.

13. A review of SMS shows a transaction was completed to transfer the applicant from the USAR TPU to the Retired Reserve effective 1 August 2020, due to maximum authorized years of service.

14. The applicant's DA Form 5016 shows:

- the applicant was born in 1963
- his rank is colonel
- effective 1 August 2020, he completed 29 years, 5 months, and 18 days of qualifying service for retirement

15. The applicant provided copies of email correspondence, between himself and numerous individuals within his USAR command, dated between July 2020 and September 2020, which show:

a. On 1 July 2020, the applicant wrote he was requesting Military Occupational Specialty (MOS) Medical Retention Board (MMRB), stating COVID 19 made lining up retirement extremely challenging. Due to mandatory stay-at-home orders in Michigan, he was not able to arrange an appointment with his primary care provider (PCP) until 26 June. He respectfully requested assistance getting his information in front of an MMRB and possible extension of his MRD to allow the same. He stated he attached his packet with PCP memorandum and his VA assessment. His left hip and back had become extremely problematic as a result of his parachuting injury to his left ankle with his gait and stance all impacted. Note, the applicant has not provided this packet with his application to the Board.

b. On 2 July 2020, the Staff Nurse Officer in the Medical Actions Office responded to the applicant, stating a review of his previous profile request was made and it revealed it had been disapproved for insufficient supporting medical documentation. The profile request packet he submitted today was not complete either. His provider would have to complete the Summary of Care by Non-Military Medical Provider as well as the Functional Capability Form (please use the attached form). Once complete,

please attach any other supporting medical documents and return it to their office for review and submission. If he chose to send only the doctor's letter, he would need to include all of his diagnostic reports, treatment records, etc. However, if he chose the Summary of Care, it should cover the requirements needed to process his profiles. The summary is more specific and gives the reviewer a better picture of what the doctor is recommending.

c. On 17 July 2020, the applicant responded, stating his previous request was rejected due to a change in forms. Please note the VA has all x-rays and was the decision authority regarding disability and is quite comprehensive. Document attached. Inclusion of his PCP letter supports the worsening condition for his left hip and back. Document also attached. Please keep all documents together when sending to the MMRB. He appreciates all her efforts and acknowledges the challenges due to the tyranny of distance and COVID-19 environment. Michigan was shutdown, preventing earlier action on his part. Again, he requests retirement orders from the 81st Readiness Division be rescinded and his MRD extended to accommodate an MMRB.

d. On 17 July 2020, the Staff Nurse Officer in the Medical Actions Office acknowledged receipt. The applicant responded on the same date asking how the MMRB gets established, to which the Staff Nurse Officer responded with attached information regarding the MOS Administrative Retention Review (MAR2) (formerly the MMRB) process.

e. On 18 July 2020, the applicant responded he understood all; therefore, it was imperative to rescind his retirement orders from the 81st Readiness Division to await MAR2 then MEB processing.

f. On 17 August 2020, an email from an individual at the U.S. Army Reserve Command (USARC) informed the applicant that after their discussion on Friday, his case was forwarded to their Judge Advocate General (JAG), who responded: "DES starts on the date the second signature is applied the profile (by the approving authority) per Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation). The applicant's MRD was 1 August 2020. His P3 profile was approved on 8 August 2020. Therefore, he is ineligible for DES." His case would be closed based on this review.

g. On 18 August 2020, the applicant responded he understood and asked if no consideration regarding the unprecedented COVID 19 environment and inability to see/coordinate with care providers would be given?

h. On 9 September 2020, the applicant emailed again, stating before he engaged his Congressional representative, he had questions. His understanding was this was reviewed by the USARC JAG, but was anyone in a "command" position involved? A

JAG can offer advice and/or an opinion, but a decision regarding application of a regulation is the purview of a commander. This decision, to deny a retiring colonel with 40 years of service since age 17, during the COVID 19 period of challenges to engage medical providers with no military installation within reasonable driving distance to initiation an MEB, and being 4 days late, may shed a bad light upon the USAR. If he does not need to pursue the Congressional representatives course of action, he would prefer not. Please advise after engaging proper authority within the chain of command.

16. On 26 May 2023, the applicant applied for retired pay benefits, which was approved on 9 June 2023.

17. AHRC Orders C06-397594, dated 9 June 2023, retired the applicant, and placed him on the Army of the United States Retired List effective 5 January 2022. AHRC Orders C06-397594A01, dated 28 June 2023, amended the applicant's social security number on the original orders, which was incorrectly annotated.

18. A review of SMS shows a corresponding transaction was completed to transfer the applicant from the Retired Reserve to the Army of the United States Retired List effective 5 January 2022.

19. The Army rates only conditions determined to be physically unfitting at the time of discharge, which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career. The VA does not have authority or responsibility for determining physical fitness for military service. The VA may compensate the individual for loss of civilian employability.

20. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, the Army Aeromedical Resource Office (AERO), and/or the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting revocation of his orders for his length of service (LOS) retirement and, in essence, a referral to the Disability Evaluation System. He has indicated on his DD 149 that PTSD is an issue related to his requests. He states:

"I respectfully request medical retirement based upon my Veterans Administration evaluation of 90% disability.

I had initiated the process for a medical evaluation/review board for medical retirement as I was assigned a 90% disability rating by the Veterans Administration and was denied during COVID quarantine coupled with my status as a Reservist beyond reasonable commuting distance of an active-duty base.

I was unaware of a recourse mechanism as the Army Reserve would not extend my MRD and closed my case (20200909 email attached). Since then, my medical condition in and around my existing maladies worsened."

c. The Record of Proceedings details the applicant's service and the circumstances of the case. Orders published by the U.S. Army Human Resources Command show the former USAR Officer was placed on the AUS Retired list effective 5 January 2022.

d. The applicant's final Periodic Health Assessment (DD FORM 3024) completed 10 August 2018 shows he was in good health. The only positive answers in the review of systems were for tinnitus and elevated cholesterol – both being treated – and "Recurring muscle, joint, or low back pain" which impacted duty performance but for which he was not receiving care. He indicated it "Distracts me, can do usual activities." He stated his only medication was ibuprofen for back pain and his mental health screening was negative for significant mental health conditions. He was found "FULLY MEDICALLY READY."

e. When he completed the Functional Capacity Certificate to accompany this PHA, he marked the 24 boxes to indicate he was a fully functioning Soldier without limitations.

f. When he completed another Functional Capacity Certificate in May 2020, he marked numerous boxes indicating he was now not a fully functioning Soldier and he was no longer able to perform the Army Physical Fitness Test (APFT) due to "Chronic low back pain, degenerative arthritis left hip." He stated he was on a temporary profile for these conditions, but no such profile was submitted with the application or found in MEDCHART.

g. The applicant's first physical profile was a non-duty limiting permanent profile for hearing loss dated 15 June 2020.

h. The applicant had a duty limiting permanent profile prepared on 29 July 2020 for “Upper Back/Rib Injury/Pain, Lower Back/Tailbone Injury/Pain/ and “Hip injury/Pain (Left).”

i. In the Army, all duty-limiting permanent profiles must be reviewed and approved by an approval authority. Once the profile is approved, the applicant is eligible for the DES: Duty related if one or more of the conditions is duty related, and non-duty related if none of the conditions is duty related. His profile was approved 8 August 2020.

j. Emails submitted with the application show the applicant’s MRD was 1 August 2020. The applicant believes that had the approval authority signed the profile prior to his MRD that he would have been entered into the DES. However, the DES only compensates Soldiers for a career terminated by an illness or injury. The DES compensates Soldiers when their career is terminated prior to retirement due to a service incurred medical condition. Paragraph 1-1b of AR 635–40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017) states a purpose of the DES is to:

“Provide benefits for eligible Soldiers whose military Service is terminated because of a service-connected disability.”

k. Paragraph 5-5 of AR 635–40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017):

“5–5. Presumption of fitness

The DES compensates disabilities when they cause or contribute to career termination. Servicemembers who are pending retirement at the time they are referred for disability evaluation are presumed fit for military Service as set forth below.”

l. When a Service Member is referred to the DES during the 12-month presumptive period, the member is found fit by presumption because the medical condition(s) did not cause or contribute to their career termination and so are non-compensable. For the Army, the date of referral to the DES is the date the Soldier’s profile is signed by the approval authority.

m. Paragraph 5-5b of 6-35-40 defines the presumptive period:

b. Presumptive period. The PEB will presume Soldiers to be pending retirement when the Soldier's date of referral to the DES is after any of the circumstances listed below.

(1) The Soldier's request for voluntary retirement has been approved. Revocation of voluntary retirement orders for purposes of referral into the DES does not negate application.

(2) An officer has been approved for selective early retirement.

(3) An officer is within 12 months of mandatory retirement due to age or length of service.

(4) An officer or enlisted is within 12 months of mandatory removal date and will be retirement eligible.

(5) An enlisted member is within 12 months of their RCP or expiration of term of service and will be eligible for regular retirement.

(6) An RC member is within 12 months of mandatory removal date from active status and qualifies for a 20-year letter at the time of referral to the DES.

(7) The Soldier is a retiree recall, to include those who transferred to the Retired Reserve, with eligibility to draw retired pay upon reaching the age prescribed by statute unless the recalled retiree incurred or aggravated the medical condition while on their current active-duty orders and overcomes the presumption of fitness.

(8) The Soldier has been approved for retirement under a Temporary Early Retirement Authority so long as the Army program guidance allows Soldiers to accept such offer when they require or are pending DES evaluation, or otherwise before the outcome of the DES is known.

n. In these cases, the Service Member is retirement eligible for length of service and is within 12 months of retirement, and so their medical condition(s) did not cause or contribute to career termination and are not therefore compensable. The Service Member will go on to receive retirement pay when eligible.

o. There are three circumstances in which a medical condition may overcome the presumption of fitness. Paragraph 5d of AR 635-40:

d. Overcoming the presumption of fitness rule. Soldiers may overcome this presumption by presenting a preponderance of evidence that they are unfit for military Service. The presumption of fitness rule may be overcome (rebutted) when—

(1) Within the presumptive period an illness or injury occurs that would prevent the Soldier from performing further duty if they were not retiring or not a retiree recall.

(2) Within the presumptive period a serious deterioration of a previously diagnosed condition, to include a chronic condition, occurs and the deterioration would preclude further duty if the Soldier were not retiring or not a retiree recall.

(3) The condition for which the Soldier is referred is a chronic condition and a preponderance of evidence establishes that the Soldier was not performing duties befitting the Soldier's office, grade, rank, or military occupational specialty (MOS) before entering the presumptive period. The ability to perform further duty is not a consideration. (For retiree recalls, this overcoming circumstance pertains to whether the Soldier was performing befitting duties before initially retiring.)

p. There is no evidence his chronic back and hip pain met any of the criteria to overcome the presumption of fitness with 12 months of his MRD, his presumptive period.

q. His final Strategic Grade Plate (O6) Officer Evaluation Report (DA Form 67-10-3) was an extended annual covering 16 June 2018 thru 7 September 2019. It shows he passed his APFT on 14 August 2018 and met height and weight standards.

r. His rater opined:

"Fantastic performance during this rating period. Due to Jerry's attention to detail and process-oriented aptitude, the 207th successfully participated in Dong Maeng 19-1 exercise by providing improved targeting and SOPs that did not exist between ROK and US Forces. Additionally, the 207th was consistent in readiness metrics due in large part to Jerry's understanding of root cause analysis and system/process improvement."

s. His senior rater opined:

"COL [Applicant] is a very seasoned, savvy, decisive officer with a deep understanding of combat arms employment in the battle space. It is from these

strengths that he successfully commands and leads soldiers. He would be a phenomenal two-star G3 or TF CDR [Task Force Commander]. Because of his analytical and process engineering strengths, he also would serve the Army well in the JS or Army Staff G3/5/7.”

t. JLV shows he has been awarded multiple VA service-connected disability ratings. However, the DES only compensates an individual for service incurred medical condition(s) which have been determined to disqualify him or her from further military service and consequently prematurely ends their career. The DES has neither the role nor the authority to compensate service members for anticipated future severity or potential complications of conditions which were incurred or permanently aggravated during their military service; or which did not cause or contribute to the termination of their military career. These roles and authorities are granted by Congress to the Department of Veterans Affairs and executed under a different set of laws.

u. It is the opinion of the Agency Medical Advisor that revocation of his orders and referral to the DES are not warranted.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief is not warranted.

2. The Board concurred with the conclusion of the ARBA Medical Advisor that the evidence does not show the applicant had any duty-related disabling conditions that would have been a basis for referral to the Disability Evaluation System prior to his transfer to the Retired Reserve in 2020 based on reaching his maximum authorized years of service. Based on a preponderance of the evidence, the Board determined the applicant’s transfer to the Retired Reserve and subsequent placement on the Army of the United States Retired List upon reaching age 60 were not in error or unjust.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

4/1/2025

X

CHAIRPERSON

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), sexual assault, or sexual harassment.

Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences.

3. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 (Discharge Review Board (DRB) Procedures and Standards) and Army Regulation 635-40 (Disability Evaluation for Retention, Retirement, or Separation).

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty (MOS) Medical Retention Board; and/or they are command-referred for a fitness-for-duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and Physical Evaluation Board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise their ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

c. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of their office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

4. Army Regulation 635-40 establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

a. Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

c. When a Soldier is being processed for separation or retirement for reasons other than physical disability, continued performance of assigned duty commensurate with their rank or grade until the Soldier is scheduled for separation or retirement, creates a presumption that the Soldier is fit.

d. The DES compensates disabilities when they cause or contribute to career termination. Service members who are pending retirement at the time they are referred for disability evaluation are presumed fit for military service as set forth below:

(1) Soldiers in the presumptive periods below are eligible to be referred to the DES when they have medical impairments that do not meet the medical retention standards according to Army Regulation 40-501. With the exception of unfit Soldiers approved for continuation, these Soldiers enter the PEB phase of the DES under the rebuttable presumption that they are physically fit.

(2) Presumptive period. The PEB will presume Soldiers to be pending retirement when the Soldier's date of referral to the DES is after an of the circumstances listed below:

- the Soldier's request for voluntary retirement has been approved; revocation of voluntary retirement orders for purposes of referral into the DES does not negate application
- an officer has been approved for selective early retirement
- an officer is within 12 months of mandatory retirement due to age or length of service
- an officer or enlisted is within 12 months of their retention control point (RCP) or expiration term of service (ETS) and will be eligible for regular retirement
- a Reserve Component member is within 12 months of mandatory removal date from active status and qualifies for a 20-year letter at the time of referral to the DES
- the Soldier is a retiree recall, to include those who transferred to the Retired Reserve, with eligibility to draw retired pay upon reaching the age prescribed by statute unless they incurred or aggravated the medical condition while on their current active duty orders
- the Soldier has been approved for retirement under a Temporary Early Retirement Authority (TERS) so long as the Army guidance allows Soldiers to accept such offer while pending DES evaluation or before the outcome of the DES is known

(3) Overcoming the presumption of fitness rule. Soldiers may overcome this presumption by presenting a preponderance of evidence that they are unfit for military service. The presumption of fitness rule may be overcome (rebutted) when:

- within the presumptive period, an illness or injury occurs that would prevent the Soldier from performing further duty if they were not retiring or not a retiree recall
- within the presumptive period, a serious deterioration of a previously diagnosed condition, to include a chronic condition, occurs and the deterioration would preclude further duty if the Soldier were not retiring or not a retiree recall
- the condition for which the Soldier is referred is chronic and a preponderance of the evidence establishes the Soldier was not performing duties befitting their office, grade, rank, or MOS before entering the presumptive period; the ability to perform further duty is not a consideration

5. Army Regulation 40-501 provides information on medical fitness standards for induction, enlistment, appointment, retention, and related policies and procedures. Soldiers with conditions listed in chapter 3 who do not meet the required medical standards will be evaluated by an MEB and will be referred to a PEB as defined in Army Regulation 635-40 with the following caveats:

a. U.S. Army Reserve (USAR) or Army National Guard (ARNG) Soldiers not on active duty, whose medical condition was not incurred or aggravated during an active duty period, will be processed in accordance with chapter 9 and chapter 10 of this regulation.

b. Reserve Component Soldiers pending separation for In the Line of Duty injuries or illnesses will be processed in accordance with Army Regulation 40-400 (Patient Administration) and Army Regulation 635-40.

c. Normally, Reserve Component Soldiers who do not meet the fitness standards set by chapter 3 will be transferred to the Retired Reserve per Army Regulation 140-10 (USAR Assignments, Attachments, Details, and Transfers) or discharged from the Reserve Component per Army Regulation 135-175 (Separation of Officers), Army Regulation 135-178 (ARNG and Reserve Enlisted Administrative Separations), or other applicable Reserve Component regulation. They will be transferred to the Retired Reserve only if eligible and if they apply for it.

d. Reserve Component Soldiers who do not meet medical retention standards may request continuance in an active USAR status. In such cases, a medical impairment incurred in either military or civilian status will be acceptable; it need not have been incurred only in the line of duty. Reserve Component Soldiers with non-duty related medical conditions who are pending separation for not meeting the medical retention standards of chapter 3 may request referral to a PEB for a determination of fitness in accordance with paragraph 9-12.

6. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.

7. Army Regulation 140-10 (USAR Assignments, Attachments, Details and Transfers) covers policy and procedures for assigning, attaching, removing, and transferring USAR Soldiers. Chapter 7 (Removal from Active Status) pertains to the removal from an active status.

a. Chapter 7, Section 1 (Reasons for Removal) provides the reasons for removal from an Active Status. The reasons for removal from an active status are length of service, maximum age, nonparticipation, failure to maintain a security clearance, non-selection for promotion, failure to complete military education requirements, nonacceptance of assignment, theological students failing to qualify for the Chaplain branch, and miscellaneous reasons.

b. Paragraph 7-2 (Length of service) (removal rule 1) specifies officers and enlisted Soldiers will be removed from an active status when they complete the maximum years of service, either total commissioned service or length of service. For colonels, removal from the active status occurs on the first day of the month after the month in which the officer completes 30 years of commissioned service.

c. Paragraph 7-3 (Maximum age) (removal rule 2) specifies Soldiers not sooner removed for another reason will be removed from the active status list when they reach maximum age. Soldiers removed under this rule will be transferred to the Retired Reserve, if eligible, unless discharge is requested. Removal date will be the last day in which they reach the maximum age. For field and company grade officers the maximum age is 60.

d. Chapter 7, Section II (Exceptions to Removal from Active Status), states this section lists the authorized exceptions to removal from an active status and describes processing procedures. Exception to removal from an active status may be authorized under general exceptions or numbered exceptions.

e. Paragraph 7-14 (Numbered exceptions) provides the numbered exceptions to specific reasons for removal from an active status that are authorized. Exception Number 18 (Retaining officers beyond mandatory removal date (MRD) for physical disability evaluation) shows:

(1) Authority found within Title 10 U.S. Code 14519 provides for the deferment of the retirement or separation of an RC commissioned officer (excluding commissioned WO) not on AD when the Secretary determines that the evaluation of the physical condition of an officer and determination of the officer's entitlement to retirement or separation for physical disability require hospitalization or medical observation and that such hospitalization or medical observation cannot be completed with confidence in a manner consistent with the member's well-being before the date on which the officer would otherwise be required to retire or be separated under this title, the Secretary may defer the retirement or separation of the officer.

(2) An officer may request deferral of retirement or separation under this provision if referred for physical disability evaluation prior to the prescribed date for retirement or separation. The request must be submitted through the officer's chain of command to the Deputy Chief of Staff, G-1 for approval/disapproval, and include the chain of command endorsement; DA Form 3349 (Physical Profile); a memorandum signed by the RSC Surgeon stating the diagnosis, treatment plan, estimated completion date of the medical evaluation board/, and contact information; DD Form 2870 (Authorization for Disclosure of Medical or Dental Information); and a current retirement points statement. The Director of Military Personnel Management will take final action on requests. The listed authorities are not interpreted to require the Soldier to be

hospitalized. Medical observation is interpreted to mean the Soldier has a condition that fails the medical retention standards of Army Regulation 40-501.

8. Title 38, U.S. Code, section 1110 (General – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

9. Title 38, U.S. Code, section 1131 (Peacetime Disability Compensation – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

10. Title 10, U.S. Code, section 1556 requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//